Delta Carbonate, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 5–CA–20419

April 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 14, 1991, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and briefs in response to each other's exceptions. Also, the General Counsel and the Charging Party filed a joint motion to correct the judge's recommended Order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and the motion and has decided to affirm the judge's rulings, findings[1] and conclusions[2] as modified herein and to adopt the recommended Order as modified and set forth in full below.[3]

1. We agree with the judge that as of the date of the Union's February 27, 1989[4] request to the Respondent that it recognize and bargain with the Union as the certified collective-bargaining representative of the unit employees, the Respondent had hired a substantial and representative complement of employees, all 21 of whom had been represented by the Union as unit employees of the Respondent's predecessor, Bestone, and all of whom were hired by the Respondent without any break in service between their employment with Bestone and their subsequent employment with the Respondent.

Accordingly, we also agree with the judge that the Respondent was not justified in delaying its recognition of the Union past February 27 on the asserted grounds that the Respondent planned substantially to diversify its product line and expand its customer base, with an anticipated resultant increase in production and in the work force. We find that these plans for diversification and expansion were not so certain and predictable in terms of timing and scope as to warrant the Respondent's delaying its recognition of the Union past the Union's February 27 demand for recognition.[5]

In so finding, we note, in addition to the considerations discussed by the judge, the testimony of the Respondent's director of sales and marketing, Jerry Gauntt, summarized below.

When the Respondent took over from Bestone on February 18, it was producing only one type of calcium carbonate filler (designated YS35), about 90 percent of which was being sold under contract to one customer, Armstrong World Industries, which was in the floor covering industry. Also, a relatively small amount of YS35 byproduct (designated YS35F) was being sold to two other companies in the same industry.

Gauntt testified that almost every application for calcium carbonate filler has its own particular set of specifications, that there are at least 13 major industrial markets for the various types of calcium carbonate fillers, that each market industry requires a different set of product characteristics, that even particular customers within an industry may have different product specification requirements, and that, therefore, a product sold in one market generally cannot be sold in another. By way of example, Gauntt testified that the product being sold to Armstrong at the time of the Respondent's purchase of Bestone was not salable in other markets.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent is a successor employer. We disavow, however, the judge's statement that the Supreme Court in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), attached a certain ''importance . . . to unbroken representation,'' which suggested (to the judge) that ''the right to representation 'as quickly as possible,' consistent with the attainment of 'substantially normal production' and other relevant factors, should receive the greater emphasis.'' Contrary to the judge's suggestion, we did not endorse the judge's comments drawn from his reading of *Fall River* in two recent cases—*Williams Enterprises*, 301 NLRB 167 fn. 1 (1991), and *Bendix Transportation Corp*., 300 NLRB 1170 fn. 1 (1990).

[3] As discussed infra, we affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by generally refusing to recognize and bargain with the Union, and also by specifically failing and refusing to bargain with the Union about the Respondent's decision to subcontract its quarry operations and about the effects of that decision.

In their joint motion to correct the judge's recommended Order, the General Counsel and the Charging Party Union assert that the judge inadvertently failed to include in his recommended Order certain cease-and-desist as well as affirmative action language to remedy these unfair labor practices.

We find merit in this motion, and we shall modify the judge's recommended Order accordingly.

Also, the judge's recommended Order includes broad cease-and-desist language requiring the Respondent to cease and desist from violating the Act ''in any other manner.'' We find that a broad proscription is not warranted here. *Hickmott Foods*, 242 NLRB 1357 (1979).

[4] All dates are 1989 unless otherwise stated.

[5] In affirming the judge's finding that the Respondent was a successor employer to Bestone, we do not rely on his remark in the penultimate paragraph of sec. I,B (''Analysis'') of his decision, that ''[a] quarry is a quarry, a whiting mill is a whiting mill, a truck is a truck.''

Gauntt further testified that the market for the Respondent's principal product, calcium carbonate, in the Respondent's geographical area was extensive—''almost unlimited.'' He also testified, however, that such mineral fillers are essentially commodities, albeit relatively specialized ones, and that most customers who purchase mineral fillers such as calcium carbonate are interested in obtaining or identifying alternate sources of supply of equivalent quality product at a lower price. Thus, Gauntt testified that his primary responsibilities upon arriving at the Respondent in early March were to develop new customers, to diversify the product line, and to expand the Respondent's business beyond that which existed under the predecessor, Bestone.

Gauntt described the process of developing new products and new customers generally as follows. After an initial contact with a potential customer, the Respondent would provide the prospect with a sample of the proposed new product. If the initial sample was approved by the prospect's research and development department, then the Respondent would provide progressively larger samples. Depending upon the size of the prospective customer and the industry involved, up to 40 truckloads of the new product might have to be provided on a trial basis to determine its acceptability to the prospective customer. According to Gauntt, ''[i]t is basically a process of incrementally larger samples for the evaluation of the material.'' Along with the initial 10- to 15-pound sample of the proposed product, the Respondent generally also provided basic technical information about the new product's physical characteristics and chemical analysis. Gauntt testified that under this process it takes a minimum of 3 months to develop a new customer.

In recounting the development of a particular new customer in the roofing industry, for example, Gauntt testified that he first contacted the customer by telephone in March. About 2 months later, he was able to provide the new prospect with a sample of a proposed new product. After the prospect's research and development laboratory had analyzed the sample, with positive results, Gauntt traveled to the prospect's plant, where he had an all day meeting with the prospect's purchasing agent. Once the prospect's laboratory had agreed theoretically that the proposed new product could be used, Gauntt then turned his attention to ''the commercial side of it, where the economics make sense for them.'' Gauntt explained that most prospective customers did not want to proceed with a further evaluation of the proposed new product after the research and development analysis step, unless it appeared that it would be economically beneficial for them to do so.

In the particular example described by Gauntt, the potential for economic success was considered to be favorable, and in late May the Respondent embarked on the next phase of new customer and product development, which was to provide a truckload sample of the proposed new product for the prospect to process through its plant. Ultimately, the prospect accepted the new product, and in early July the Respondent and the new customer entered into a contract.[6]

Gauntt also described the Respondent's experience in the development of new products and new customers in the cement industry as being very similar to that in the roofing industry, as described above. By August, the Respondent had a contract to supply its first customer in the cement industry, and was also engaged in continuing discussions and new product evaluations for other prospective customers in that industry.

In sum, the record establishes that the Respondent's immediate postpurchase February plans for extensive diversification of its product line and significant expansion of its customer base, with an anticipated resultant substantial increase in production, were dependent on the vagaries of new product development and new customer cultivation.

There was no timetable in February for the Respondent's anticipated expansion—nor could there reasonably have been one. Thus, we find that the Respondent's February plans for diversification of products and expansion in customers were too uncertain and unpredictable to justify its refusal to recognize the Union on February 27 on the asserted grounds that it had not yet hired a substantial and representative complement of employees.[7]

2. Contrary to the judge, we find that Shift Supervisors Raymond Hearn, Larry Teal, and Joseph Kershner are supervisors within the meaning of Section 2(11) of the Act and therefore should be excluded

[6] Gauntt also described, in essentially the same terms, the Respondent's development of another new product and new customer in the roofing industry during the same general March-July time frame.

[7] The instant situation is significantly different from the one addressed in the Board's recent decision in *Cascade General*, 303 NLRB 656 (1991). There, the Board found that the employer had violated Sec. 8(a)(2) by recognizing a union as the collective-bargaining representative of its employees before the employer had hired a substantial and representative complement of unit employees. Unlike the Respondent, the employer in *Cascade*, as the result of its acquisition of another, much larger company, had certain and necessary plans to expand its operations immensely and quickly to increase its work force by many times more than the number of employees it had employed at the time it recognized the union. Thus, the employer in *Cascade* had only 14 employees in the bargaining unit when it recognized the union, but because of its vastly changed operational and economic situation, the evidence showed that the employer's planned expansion would require employing hundreds of unit employees.

from the appropriate unit in which bargaining is ordered.[8]

John Lizak, the Respondent's acting general manager at the time in question, testified that Hearn, Teal, and Kershner were responsible for, inter alia, directing and disciplining the employees on their shifts, and recommending to Lizak applicants for hiring. Lizak testified that Hearn was actively involved in the interviewing and hiring process and that Teal and Kershner were less involved because they worked on the later shifts.

Lizak also testified that these three new supervisors had authority to recommend discharge, although, as with hiring, Lizak retained final authority over discharge. They also had authority to give employees unscheduled time off from work and to discipline employees as they found it necessary to do so in their judgment.

Hearn testified that as a shift supervisor he directed and assigned the three employees on his shift.[9] More specifically, he testified that he approved vacations and personal days off, determined the need for overtime on his shift depending upon situations that arose during the shift, and assigned particular employees to work overtime. He interviewed applicants for employment and made recommendations for hiring which were generally approved by the Respondent.

Hearn testified that he verbally reprimanded employee Gregory Roehm for repeated tardiness. He also testified that he recommended the discharge of a plant operator for poor performance, and that his recommendation was approved.

Also during his tenure as day-shift supervisor, Hearn effectively recommended promotions and raises for employees Steve Guiffrida and Terrance Bowman.

In April 1990, Hearn was promoted again, this time to production superintendent. At that time, he recommended to higher management that Ted Halloran be promoted to replace him as first-shift supervisor. This recommendation was approved.[10] Although neither Teal nor Kershner testified, the preponderance of the evidence establishes that their supervisory duties and responsibilities as second- and third-shift supervisors were essentially the same as Hearn's as first-shift supervisor.

In this regard, Hearn testified that after he was promoted to production superintendent in April 1990, he was the immediate supervisor of Shift Supervisors Teal, Kershner, and Halloran. Hearn testified that as shift supervisors, Teal and Kershner made their own determinations about rewarding or disciplining employees on their shifts. More specifically, Teal and Kershner made recommendations to Hearn for promotion or for discipline of particular employees, and Hearn would simply ''verify'' the appropriate personnel forms, by countersigning them, i.e., he made no independent investigation. Hearn testified that he regarded their recommendations for personnel actions ''very highly.'' Although this testimony pertains to supervisory authority of Teal and Kershner a year after their promotion to shift supervisor jobs, there is nothing in the record to suggest that Teal and Kershner did not possess from the time of their promotion in March 1989 the supervisory authority for effectively recommending personnel actions that Hearn specifically testified they possessed as his subordinates after April 1990. Rather, the clear weight of the evidence is that, like Hearn, they possessed such supervisory authority at all material times starting with their promotions to shift supervisor in March 1989.

Here, the uncontradicted evidence establishes that Hearn, Teal, and Kershner had the authority, in the exercise of their independent judgment, to discipline employees, give them unscheduled time off, and effectively to recommend hiring, promotion, and discharge. The evidence expressly establishes that Hearn also had authority to determine whether overtime was required on his shift, and to assign employees to work overtime.

Accordingly, we find that Hearn, Teal, and Kershner possessed supervisory authority sufficient to warrant their exclusion from the unit referred to in the bargaining Order.

3. We agree with the judge, for the reasons he sets forth, and for the reasons set forth below, that the Respondent unlawfully subcontracted its crushing and hauling quarry operations to Rockcrest Contracting, a sister company (but did not unlawfully subcontract its major stripping requirements), and in conjunction therewith unlawfully terminated its quarry operations employees.[11]

[8] At the time of the Union's February 27 request for recognition, Hearn, Teal, and Kershner had not yet been promoted to supervisory positions, and were among the 21 unit employees that we have found to constitute a substantial and representative complement of employees. Consequently, our determination that Hearn, Teal, and Kershner subsequently became statutory supervisors when they were promoted in mid-March does not affect our affirmation of the judge's finding that the Respondent unlawfully refused to recognize and bargain with the Union as of February 27.

[9] Hearn's testimony was uncontradicted and was not specifically addressed by the judge.

[10] The judge erroneously found that there was no evidence that Hearn was replaced as day-shift supervisor following his promotion to production superintendent.

[11] The judge found that when the Respondent began operations (in mid-February), it had not yet decided to subcontract the quarry operations. In this regard, the judge found that ''the evidence, while inconsistent, discloses that the earliest date given for such a decision [i.e., to subcontract] was 'late March.''' Respondent Official William Vest testified, however, that although the Respondent did not specifically decide on Rockcrest Contracting as the particular subcontractor until late March, the Respondent made its general decision to subcontract in *early* March.

a. The complaint, as amended, alleges (1) that both the subcontracting of quarry operations and the terminations of quarry operations employees were discriminatorily motivated in violation of Section 8(a)(3) of the Act, and (2) that the Respondent failed to bargain with the Union about both the decision to subcontract and its effects, and about the terminations, in violation of Section 8(a)(5).

Although the judge found that the terminations of the quarry-operations employees were discriminatorily motivated in violation of Section 8(a)(3), and that the failure to bargain about the decision to subcontract the quarry operations (i.e., crushing and hauling, but not major stripping) and its effects violated Section 8(a)(5), he did not make an express finding that the decision to subcontract the quarry operations in question was itself discriminatorily motivated in violation of Section 8(a)(3), as alleged.

The record establishes that the issue of the Respondent's motivation for the subcontracting was fully litigated during the hearing, and the judge thoroughly analyzed the evidence on this issue. He found that the seven quarry employees who were terminated in conjunction with the subcontracting were terminated because of their status as former Bestone employees who had been represented by the Union, and because of the Respondent's desire to reduce the number of such formerly represented employees in its work force so as to avoid a successorship bargaining obligation upon the Respondent's attainment of a substantial and representative complement of employees.

We find that the evidence establishes that the Respondent's decision to subcontract its crushing and hauling quarry operations was discriminatorily motivated in violation of Section 8(a)(3), that the judge's analysis of the evidence supports that finding, and that his failure to make an express finding was an oversight.

b. In affirming the judge's finding that the General Counsel made a prima facie showing that the Respondent was discriminatorily motivated in its decision to subcontract the quarry operations and to terminate the quarry-operations employees, we note particularly that the judge credited the testimony of the Respondent's general manager, Kenneth Musselman, about statements made to him by both William Vest (then vice president for operations of Millington Quarry, Inc., which was in effect the Respondent's parent company during the startup period in question, with Vest in day-to-day operational control of the Respondent) and Thomas Brown (a Millington administrative official who was active in the day-to-day administration of the Respondent during this startup period). According to Musselman's credited testimony, he heard several times from Vest and Brown that they did not want to deal with the Union and that that was the main reason Rockcrest was there. We find that the statements of Vest and Brown to Musselman demonstrate the Respondent's union animus in deciding to subcontract the quarry operations in question.

c. As further evidence of the Respondent's union animus in terminating the quarry-operations employees, the judge found, and we affirm, that the Respondent induced the quarry operations employees, all former Bestone employees represented by the Union, to reject the Respondent's offers of other jobs with the Respondent, and to accept instead offers of employment from the subcontractor, Rockcrest (one of the Respondent's sister companies within the Millington corporate family). More specifically, the Respondent offered its quarry-operations employees the choice of accepting lower paying jobs with the Respondent in lieu of indefinite layoff, or of applying to Rockcrest for jobs that provided employment at the same rate of pay as the employees had earned with the Respondent. None of the seven chose to accept the lower paying jobs with the Respondent, and all instead applied for and were immediately hired by Rockcrest to continue performing essentially the same job duties, with no interruption in employment or reduction in wage rates.

The Respondent excepts to, inter alia, the judge's finding that it induced the quarry-operations employees to reject its offers of other jobs with the Respondent by offering less pay. The Respondent argues that the judge erroneously failed to find that the Respondent had repeatedly assured all former Bestone employees working for the Respondent that they would not suffer any reduction in wages as a result of transferring to different jobs within the Respondent, and that therefore the seven quarry employees in question were in fact not faced with the prospect of lower paying jobs with the Respondent as an alternative to either indefinite layoff or employment by Rockcrest.

The record does establish that the Bestone employees who accepted employment with the Respondent at the time of the Respondent's mid-February purchase of Bestone continued to be paid at the same rates as they had been paid by Bestone. The Respondent also told the former Bestone employees at the time of their hire by the Respondent and in at least two subsequent group meetings in March and early April (the record is not more specific), that they would not take a cut in pay if they were subsequently transferred to a job

---

The judge also found that Vest gave conflicting testimony about whether the Respondent had made its decision to subcontract before or after it had received certain cost comparison information from Frederick Barton, owner of the Respondent's predecessor, Bestone Corporation. The record shows, however, that the testimony that the judge found to be in conflict with Vest's testimony was given not by Vest but by another Respondent official, Conrad Eiben.

Our clarification of these factual matters does not, however, affect the result which we reach in this case.

with the Respondent that called for a pay rate lower than what the transferee was already earning.[12]

Those oral statements were, however, contradicted by a subsequent letter to each employee describing the jobs to which they could transfer within the Respondent's own operation. On April 5, the Respondent notified the quarry-operations employees in writing that the quarry operations were going to be subcontracted to Rockcrest effective April 17, that the Respondent would thereafter have no work for the quarry-operations employees, but that these employees would be given the opportunity to transfer into vacant positions within the company. The vacant positions and their pay rates were set forth on a form enclosed with the April 5 letter. The letter further stated that those not wishing to transfer, or not qualifying for one of the vacant jobs, would be placed on indefinite layoff, with 1 week's severance pay. Finally, the letter advised the employees that it was ''possible'' that Rockcrest might be hiring employees to work under its new subcontract with the Respondent, and that anyone who was interested in pursuing a job with Rockcrest should immediately contact that employer. Notwithstanding the Respondent's earlier general oral assurances of no loss of pay resulting from job transfers within the Respondent, the pay rates for the vacant positions shown on the form enclosed with the April 5 letter were lower than those which the quarry-operations employees were already receiving and were lower than the rates then being paid by the Respondent for comparable jobs, as specified in the Union's collective-bargaining agreement with Bestone. With regard to the vacant positions being offered in lieu of indefinite layoff, the letter stated, ''Pay rates will be as shown on the enclosed form,'' and the form itself states ''Pay rates are as shown.''

There is no elaboration or qualification in the April 5 letter or on the enclosed form about the pay rates shown for the vacant positions listed. Nor does it contain any reference to the oral ''no-loss-of-pay'' transfer policy discussed above. Further, the record does not show that the employees in question were told anything other than what is contained in the letter and the enclosed form about the particular pay rates for the vacant positions.

[12] Although the judge did find that there was record evidence that the Respondent generally told its former Bestone employees that they would not receive pay reductions if they transferred from one job to another with the Respondent, he incorrectly implied that the crucial focus in this aspect of the case was what, if anything, the Respondent told its employees about what they would be paid by *Rockcrest* if they accepted employment there. But the crucial inquiry in this aspect of the case is what the Respondent told these employees about what they would be paid by the *Respondent* if they stayed with the Respondent by accepting transfers to the vacant positions offered to them on April 5.

Thus, whatever general oral assurances the Respondent had given its work force about not suffering a loss of pay through transferring to jobs with a lower pay rate, those assurances were substantially negated with regard to the transfers to the lower paying jobs offered to the seven quarry-operations employees whose jobs were being eliminated by the subcontracting. The employees in question therefore had reasonable grounds to believe that they would suffer reductions in pay if they accepted the vacant positions being offered. Their only apparent alternatives to acceptance of such transfers were either indefinite layoff, or employment with Rockcrest with no loss of pay or employment. Accordingly, contrary to the Respondent's contention, the evidence establishes that the laid-off quarry operations employees were not promised that their wages would remain the same if they accepted another job with the Respondent.

4. The judge also found that the Respondent violated Section 8(a)(5) by failing and refusing to bargain with the Union about the Respondent's decision to subcontract the quarry operations in question and about the effects of that decision. We affirm the judge's finding of this 8(a)(5) violation. In doing so, however, we do not rely on the reasons set forth by the judge in the final paragraph of section I,B (''Analysis''), of his decision. Rather, because the decision to subcontract quarry operations was discriminatorily motivated in violation of Section 8(a)(3), we find that it also violated Section 8(a)(5). Where, as here, such a decision is motivated by antiunion reasons, an employer is not exempt from a bargaining obligation under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687–688 (1981). Discrimination on the basis of union animus cannot constitute a lawful entrepreneurial decision. *Continental Winding Co.*, 305 NLRB 122 (1991); *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

SUPPLEMENTAL REMEDY

We affirm the judge's recommended remedy, as supplemented below.

Because the Respondent discriminatorily subcontracted bargaining unit work and unlawfully failed to bargain with respect to its decision to subcontract that unit work, we shall require the Respondent to restore the status quo ante as it existed prior to the unlawful subcontracting of unit work effective April 17, 1989, reincorporate into the jurisdiction of the bargaining unit the subcontracted work previously performed by unit employees, and make whole those employees who suffered a loss of wages and benefits as a result of the unlawful subcontracting. *Westinghouse Broadcasting*, 285 NLRB 205, 218–219 (1987), enfd. 849 F.2d 15 (1st Cir. 1988); *Griffin-Hope Co.* 275 NLRB 487, 503–504 (1985). Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[13]

ORDER

The National Labor Relations Board orders that the Respondent, Delta Carbonate, Inc., York, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Subcontracting bargaining unit work because its employees are represented by a union.

(b) Refusing to recognize and bargain with United Steelworkers of America, AFL–CIO–CLC as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees and truck drivers at the Respondent's York, Pennsylvania, facility, excluding office and clerical employees, executives, professional employees, watchmen, salesmen, guards, and all supervisors as defined in the National Labor Relations Act.

(c) Failing or refusing to bargain with the Union about the March 1989 decision to subcontract quarry operations and the effect of that decision on the unit employees.

(d) Discriminating against employees so as to foreseeably cause discouragement of membership in labor organizations.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Ben R. Myers, Albert E. Ruppert Jr., Bruce W. Toomey, Walter L. Elicker, Ira Avery Jr., Willard L. Hutson, and Samuel L. Robertson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the decision.

(b) On request, bargain collectively with United Steelworkers of America, AFL–CIO–CLC as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(c) Return the work performed by the foregoing employees (not including any major stripping work) to the jurisdiction of the bargaining unit and, on the Union's request, reinstate the terms and conditions of employment that existed prior to the Respondent's April 17, 1989 subcontracting of unit work.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in York, Pennsylvania, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of the receipt of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, concurring.

I certainly agree with the view that the Supreme Court in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), rejected any rule that the moment of truth in determining whether a successor assumes the bargaining obligation of his predecessor is at the moment of initial operation after the transfer of assets. I also agree with my colleagues that the Respondent did not meet the burden of establishing that *at that moment* of transfer (or at any time before the request for recognition) the Respondent had developed an operational or business plan which detailed the steps the new managers would be taking in the imminent future to create an enterprise which changed its entrepreneurial core or character. There was no evidence of a business plan or a reorganization plan with appropriate time targets established for near-term implementation. No market study was submitted to support any change much less to support any business plan written or otherwise. The evidence presented merely shows that operational changes had occurred, but the evidence is insufficient to support the claim that those changes were made according to a formulated plan to change the operation. The fact that the employees were hired on a probationary basis is inconsequential. In short, the proof that a plan to change the business of the company was in place on February 27, 1989, the day when the Union

[13] The remedy applies to both the 8(a)(3) and 8(a)(5) violations, although it is an appropriate remedy for each violation itself.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

demanded recognition, falls far short, in my view, of the evidence needed to overcome the presumption of continued representational status expressed in *Fall River*.

Even if proof that the Respondent had a legitimate plan to subcontract were arguably present, as it is not here, the balance tilts toward finding a violation when the credited testimony of General Manager Musselman that the Respondent intended to subcontract to avoid the Union is added to the scale. Thus I join my colleagues in finding the violations here.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT subcontract bargaining unit work because our employees are represented by a union.

WE WILL NOT discriminate against any employees so as to foreseeably cause discouragement of membership in labor organizations.

WE WILL NOT fail or refuse to bargain with United Steelworkers of America, AFL–CIO–CLC, about our March 1989 decision to subcontract our quarry operations and about the effects of that decision.

> All production and maintenance employees and truck drivers at our York, Pennsylvania, facility, excluding office and clerical employees, executives, professional employees, watchmen, salesmen, guards, and all supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Ben R. Myers, Albert E. Ruppert Jr., Bruce W. Toomey, Walter L. Elicker, Ira Avery Jr., Willard L. Hutson, and Samuel L. Robertson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to subtantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, on request, bargain collectively with United Steelworkers of America, AFL–CIO–CLC as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL return the work performed by the foregoing employees (excluding any major stripping work) to the jurisdiction of the bargaining unit, and WE WILL, on the Union's request, reinstate the terms and conditions of employment that existed prior to our April 17, 1989 subcontracting of unit work.

DELTA CARBONATE, INC.

James P. Lewis, Esq., for the General Counsel.
J. Anthony Messina, Esq., Raymond Kresge, Esq., and *Louis L. Chodoff, Esq. (Pepper, Hamilton & Scheetz)*, of Philadelphia, Pennsylvania, for the Respondent.
David I. Goldman, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in York, Pennsylvania, on April 16–19 and May 23, 1990. Because of the pendency of appeals to the Board of various of my rulings on subpoena issues, I did not close the record until September 28, 1990, when the Board had finally disposed of the appeals. Due to unopposed requests for extensions of the date for filing briefs, the parties did not file briefs until on or about January 10, 1991.

The basic issues presented by the amended complaint[1] are (1) whether Respondent was a ''successor employer'' which, by refusing since February 27, 1989, to recognize the Charging Party as the bargaining representative of its production employees, violated Section 8(a)(5); (2) whether, by subcontracting certain of its work on or about April 17, 1989, without having afforded the Charging Party an opportunity to bargain about the decision to engage in, and the effects of, such subcontracting, Respondent also violated Section 8(a)(5); and (3) whether, by terminating the employees engaged in the subcontracted operation for reasons proscribed by the Act, Respondent violated Section 8(a)(3) of the Act.

I have given careful consideration to the testimony and exhibits presented at trial, although I may not, of necessity, make express reference to all such material in this decision; I have taken into account my recollection of the impression made on me by the witnesses; and I have considered with care the briefs submitted by the parties. Having done so, I

[1] The initial charge was filed on April 25, 1989; the original complaint was issued on September 29, 1989; an amended charge was filed on March 7, 1990; and the complaint was amended on March 26, 1990.

make the following findings of fact, conclusions of law, and recommendations.[2]

I. THE ALLEGED VIOLATIONS

A. *The Facts*

In York, Pennsylvania, successive businesses have for years mined a quarry, 303 acres in size, which principally produces a mineral called calcium carbonate. Depending on its purity, color, and the extent of the fineness to which it is ground by the processing operation, calcium carbonate has a wide variety of uses, ranging from roof tiles to paint. We are, at first, most interested in the quarry as operated by Respondent's predecessor, Bestone Corporation, whose owner was Frederick L. Barton.

Two methods of mining were used in the quarry by Bestone: underground mining, which, Barton estimated, constituted 50 percent of the work at the time he sold the company to Respondent on February 17, 1989;[3] and open pit mining, which accounted for the other half. Underground gaining is ''significantly'' more costly than open pit mining. Had Barton wished to engage in more open pit mining, he would have been required to ''strip'' additional layers of ''overburden'' away from the surface of the quarry in order to have access to the underlying white rock, which would then have been ground up as filler according to the specification of fineness needed.

Nonetheless, the evidence shows that, at the time of the gale of assets to Respondent, there were in fact a total of seven Bestone employees engaged in ''quarry operations'' (in addition to the three ''underground miners''). Their duties are minimally described in the record, and it may fairly be deduced that they did stripping, using some small stripping equipment owned by Bestone, and that they operated hauling equipment to carry exploded rock to the crushing and drying process after the rock had been blasted by drilling subcontractors under contract with Bestone. There, they crushed and dried the rock.

In addition to the three underground miners and the seven ''quarry operations'' employees working for Bestone on February 17, the day before Respondent took over the operation, Bestone also employed on that date other classifications of employees: four truckdrivers; six ''milling/sort'' operators, who ran the machinery at the ''whiting plant'' which pulverized the broken rock into various degrees of fineness; and one full-time rank-and-file maintenance employee.

These 21 employees constituted the production, maintenance, and truckdriver collective-bargaining unit represented by the Charging Party at Bestone since July 1985, which relationship had produced two successive bargaining agreements. Asked to describe the work of the Bestone employees, Barton testified that they ''mined and quarried rock, processed the rock into several products and several byproducts and further processed certain of the rocks into specialized fillers.'' The record shows that most of the fillers produced by Bestone was gold, for incorporation into flooring products, to Armstrong World Industries, Inc. (''AWI''), its largest customer, with which Bestone had entered a supply contract for a 20-year term. Bestone also had contract relationships of relatively substantial size with such companies as General Felt Industries and Owens Corning Fiberglass Corporation, and altogether apparently dealt regularly with a total of about 10 buyers.

Respondent Delta Carbonate, Inc. is a closely held, newly created corporation controlled by a firm called Millington Quarry, Inc. The president and effective owner of both Millington and Delta is one Gary Mahan, whose Millington headquarters are located in New Jersey. Millington also controls other affiliates, including Rockcrest Contracting, Inc., of Blandon, Pennsylvania, to which reference will later be made.

There seems to be no need to get out the details in stating that the purchase of Bestone by Delta Carbonate was, due to an unexpected and brief business opportunity, an extraordinarily hasty piece of work for this type of purchase. Negotiations between the two began in January and were consummated in February. However, when the smoke cleared on February 18, 1989, the day of the takeover date, 21 Bestone employees continued to work as the sole rank-and-file employees of Delta Carbonate (they were hired on a probationary basis, but Respondent's brief makes no issue of this fact); one other employee chose to retire.[4]

Moreover, at least until on or about March 18,[5] the Respondent did not hire any employees (B. Estes, a maintenance employee, was the first), although it began to advertise as early as February 24 in local newspapers for ''laborers, maintenance personnel, mechanics, and truckdrivers.'' Thereafter, Respondent hired new employees, discharged or laid off old ones, had a few employees quit, and transferred others (some of these actions will be discussed in more detail subsequently), so that by the week ending April 15, there were at least 29 employees in the former bargaining unit, and by April 7, 1990, the last week as to which we have evidence, that number had risen to 38 (21 of which were maintenance employees, as compared to only 1 such employee as of February 1989; this remarkable increase will also be discussed hereafter).

B. *Analysis*

The record makes clear that Respondent took over the Bestone quarry and equipment with the intention of increasing output and expanding the range of carbonate products. To this end, it hired a sales director and two customer liaison assistants, made changes in the production and maintenance processes, spent some serious money in buying and/or activating equipment which Bestone had not completed installing or had not used, and, eventually, doubled the capacity of the quarry to produce crushed carbonate. In addition, Respondent markets a much larger range of products than Bestone had, and distributes them over much greater distances than had Bestone.

[2] Errors in the transcript have been noted and corrected.

[3] All dates hereafter refer to 1989 except as otherwise indicated.

[4] Bestone's four production supervisory employees also transferred to Delta.

[5] The dates I assign to personnel actions hereafter are mostly derived from R. Exh. 10, a summary of personnel actions which does not pinpoint specific dates on its graph-like format. However, since we were told that the placement of the data on the exhibit was intended to coincide as nearly as possible with the actual dates, I shall attempt to guess what those precise dates were. I will not repeat ''on or about'' in each such instance, but I intend to imply those words.

Despite the gradual changes effected by Respondent in the operational modes and business orientation of the facility, it is clear from the precedents that Respondent should be considered a ''successor'' employer to Bestone, as the Board and the courts use the term. I see no need to dwell here on the legal authorities, since I have attempted to analyze them recently and at some length in *Williams Enterprises*, 301 NLRB 167 (1991), and more succinctly in *Bendix Transportation Corp.* 300 NLRB 1170 (1990).[6] As noted in those cases, and elsewhere in Board jurisprudence, the material factor, which the Board reviews in considering the issue of employment continuity (as opposed to work force continuity), as the Supreme Court recently stated in *Fall River Dyeing Corp. v. NLRB* 482 U.S. 27, 43 (1987):

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

A determination that a ''substantial continuity'' exists does not, however, require that the new operation replicate the old one in all respects; rather, the ''totality of the circumstances of a given situation'' will be assessed from the perspective of whether ''those employees who have been retained will understandably view their job situation as essentially unaltered,'' id. at 43, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). In *Derby Refining Co.*, 292 NLRB 1015 (1989), the Board reemphasized the importance of this approach: ''In the successorship situation, the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitudes about being represented.''

In the present case, it is most difficult to conclude that the employees who came en masse from Bestone to Delta, without losing a day's pay or changing their work functions or supervisors (at least for a while), would have changed their ''attitude about being represented,'' even after some time had elapsed and some changes had occurred. The employing industry—the production of fillers from calcium carbonate—continued in all its essentials without interruption. Employees still separated and removed rock from earth, hauled it to processing machinery, ground it into various products, and transported the output to purchasers. There is nothing here to persuade that employees would have considered that ''their job situation has so changed that they would change their attitude about being represented.'' As the Court of Appeals for the Third Circuit stated in *Systems Management v. NLRB*, 901 F.2d. 297, 304 (1990), ''In order to prevent the label, and consequent obligations of, 'successor employer' from attaching, a fundamental change in the nature of the business enterprise must occur. It must be more than a mere restructuring of the hours or conditions of employment.'' (Footnotes omitted; emphasis in original.)

It is the primary position of the General Counsel and the Charging Party that when the Union wrote to Respondent on February 27 to request bargaining (referring to Respondent as the ''successor employer to Bestone Corp.''), a bargaining obligation arose. Respondent did not reply until March 8, at which time it wrote that the Union's request was ''premature.'' Due, Respondent stated, to the ''rapid and sudden pace of the transaction'' by which it had acquired the property, it had only begun to ''review the operations and formulate our business plans,'' as well as being in but the ''early stages'' of interviewing and hiring employees. While expressing a desire to ''honor any legal duties we may have,'' Respondent opined that it was ''simply too early for us to be able to tell whether or not there are successorship obligations'' which needed to be met: ''Our business plans are not formulated, and we have not yet hired a substantial and representative complement of employees.'' The letter promised, however, to treat the demand for recognition as a continuing one, ''and we will respond to it at the appropriate time.''

The appropriate time turned out to be April 19, when, according to a letter of that date from Respondent, ''[a]lthough the hire of new employees is not complete and there remain some positions still open, we believe that our staffing levels are such that we have now reached a substantial and representative complement of employees for our ongoing business purposes,'' and, ''upon review of the employee complement, it is clear that the former employees of Bestone comprise a distinct minority of the work force.'' This letter was written 2 days after Respondent's sister company Rockcrest Contracting, Inc., had begun operating, under an unwritten subcontract with Respondent, to strip the overburden in the quarry, to load rock at the quarry or mine, to haul it to the crusher, to perform the crushing, to haul to the dryer, and to then haul to the whiting plant.[7] The subcontract to Rockcrest led to the discharge of all former Bestone employees involved in ''quarry operations'' (as later discussed, they were all then hired by Rockcrest and basically continued without interruption to do the work that they had been doing). The termination of these 7 employees on April 17 meant that for the first time since the takeover of the operation on February 18, the Bestone-old-employee/Delta-new employee ratio arguably fell from a Bestone majority (17[8]–12) to a Bestone old-employee minority (10-12).

In *Fall River*, supra, the Supreme Court made reasonably clear that the determination of successorship is not necessarily made on the first day on which the new enterprise in launched, but may rather relate to some (variable) time after the ship has sailed.[9] In finding a successorship, the Court, as has the Board in countless cases before and after *Fall River*, examined such factors as ''[The new employer] introduced no new product line''; it ''abandoned converting

[6] While the Board in both cases found it ''unnecessary to rely on'' certain statements made in my analysis, *Williams Enterprises*, supra at fn. 1, *Bendix Transportation Corp.*, supra at fn. 1, it refrained from expressing disapproval of those comments; I do not find, in any event, that the matters there addressed are of controlling consequence here.

[7] ''Stripping the overburden'' contemplates removing the top layer of rock to get to the ore valuable ''Super B'' rock below. The ''whiting plant'' is where the rock, having gone through the crusher, is turned into the filler products and graded into various degrees of fineness for the individual needs of customers.

[8] This figure excludes three employees who were assertedly promoted to supervisory status on March 20.

[9] The Court distinguished *Fall River*, the more usual kind of case, from *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), in which there had been no changes except the identity of the employer.

dying in exclusive favor of commission dyeing''; and ''Petitioner's change in marketing and sales . . . .'' 482 U.S. at 46 fn. 11. All such considerations necessarily refer to some point in time after the change of employers has first been accomplished, and yet they are factored into the overall decision as to whether the employer is a successor. The perspective for this determination may therefore be one oriented to the future.

At the same time, the desideratum of making union representation available as soon as fairly possible has given rise to a rule which may require the extension of recognition at a time before a new employer has given full effect to his plans for operational and personnel changes. This doctrine, referred to as the ''substantial and representative complement'' rule, can apply in such a manner that even where a new employer is a ''successor'' for purpose of ''work continuity,'' the old union may not lay claim to a bargaining obligation if, at the time that a ''substantial and representative complement'' came into being, the employees it formerly represented did not constitute a majority of the unit employees.[10]

The Charging Party argues that certain of the Court's language, as well as the rule's origination in the context of initial representation elections, makes clear that the doctrine applies only to fact patterns in which the employer undertakes a rebuilding process (482 U.S. at 47):

> In other situations, *as in the present case*, there is a *start-up period* by the new employer while it gradually builds up its operations and hires employees. *In these situations*, the Board, with the approval of the Courts of Appeals, has adopted the ''substantial and representative complement'' rule for fixing the moment when the determination as to the composition of the successor's work force is to be made. [Emphasis added.]

While Charging Party then proposes that this is not such a case, and therefore the rule does not apply, the Respondent vigorously urges the adoption of some such approach in this case.

I think that the argument advocated by the Respondent reflects the correct doctrine. The *Fall River* opinion authoritatively construes the Board's application of the rule as an examination into when ''the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production,'' as well as considering the ''size of the complement on [the Board-selected date] and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expected expansion'' (quoting *Premium Foods v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983). The reference to the requisite ''normal or substantially normal production'' standard, and, indeed, the contextual implication of one employer taking over the assets and (most of) the employees of another, indicate that, in all asserted successorship situations, future prospects may have to be taken into account.[11] It should also be noted that the First Circuit Court of Appeals in *Fall River* accurately stated that ''[i]n a successorship situation, the bargaining obligation can normally be determined at the time of transfer or when operations begin.'' 775 F.2d 425, 430.

The representative rule, stated the Supreme Court in *Fall River*, at 47, constitutes an effort to balance ''the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible.'' The importance which the Court attaches to unbroken representation in its earlier analysis in *Fall River* suggests that the right to representation ''as quickly as possible,'' consistent with the attainment of ''substantially normal production'' and the other relevant factors, should receive the greater emphasis.[12]

On brief, Respondent asserts that it had a ''game plan'' for the York site at the commencement of operations:

> [I]t is undisputed that Delta had plans for major, permanent operational and business changes by the beginning of its operations, all of which were absolutely certain and all of which implicated major changes in the work force. More specifically, it is undisputed that when Delta began its operations, it planned, among other things, to develop and implement a detailed computerized preventative maintenance program with a large maintenance hourly staff; to expand and improve the whiting plant operations by increasing the number of shifts for plant operators, the number of plant operators, the number of operator classifications and the direct supervision of the operators; to engage in extensive open pit development which entailed subcontracting of work that Delta was unable to do because of the undisputed lack of necessary equipment and trained manpower; to expand volume of product sold and to sell 100% of the product; and to change and diversify the product line that would be sold to new customers in new markets. All of these plans represented major changes when compared to Bestone's operations and business.

These assertions scarcely square with Respondent's March 8 letter, supra, which insisted that its ''business plans'' were still ''not formulated'' as of that date. Respondent's own testimony (about which more later) also shows that it is not true that when Respondent ''began its operations,'' it planned to

[10] See *Fall River*, supra: after holding that the new employer was, in law, a ''successor'' to the old one, the Court turned to consideration of the ''substantial and representative complement'' rule with the prefatory comment: ''We must thus consider *if* and when petitioners duty to bargain arose.'' (Emphasis added.)

[11] Respondent cites cases which, while factually distinguishable, stand for the foregoing principle. See, e.g., *Galis Equipment Co.*, 194 NLRB 799 (1972): ''Rather, the determination must be made on the basis of all relevant facts and among the matters to be considered are whether the situation at the moment of transfer is intended to be permanent or temporary, and if temporary, how different the permanent situation will be''; *Myers Custom Products*, 278 NLRB 636 (1986) (''When a new employer expects, with reasonable certainty, to increase its employee complement substantially within a reasonably short time, it is appropriate to delay determining the bargaining obligation for that short period.'').

[12] I note that, in *Fall River*, the Court approved a Board-selected ''representative date'' of mid-January 1983, at which time the employer had hired a shift of 55 employees (36 of them had worked for the previous employer) rather than the mid-April 1983 date urged by the successor, which had by then employed the ''full'' complement for which it had ''hoped,'' consisting of 107 employees, less than a majority of whom had been employed by the predecessor.

engage in subcontracting in the open pit; the evidence, while inconsistent, discloses that the earliest date given for such a decision was ''late March.'' The cases show that the other matters are irrelevant, since they only amounted to a ''contemplated expansion of production capacity not materially altering the nature, purpose, or structure of the employing enterprise.'' *Hudson River Aggregates*, 246 NLRB 192, 197 (1979), enfd. 639 F.2d 865 (2d Cir. 1980). Whether a purchaser is a successor ''does not focus on whether the new employer has become a bigger or better business . . . . Standing alone, the magnitude of change is irrelevant. Unless the changes affect employees' *attitudes* toward representation, they do not undermine the presumption that the old union should bargain with the new employer.'' *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 465–466 (9th Cir. 1985), enfg. 265 NLRB 1499 (1982), cited with approval in *Fall River*, supra.

To determine, however, ''if and when'' (*Fall River*, supra) a bargaining relationship took effect, we must apply the ''substantial and representative'' doctrine in those cases in which, from the beginning, the new employer has made definite plans to increase its complement substantially within a reasonably short period of time. *Miner Industries*, 285 NLRB 234, 239 (1987); *Myers Custom Products*, 278 NLRB 636, 637 (1986). The same approach would logically be called for when an employer has decided substantially to vary the nature of the employee skills required or the fundamental character of its operation.

It does not seem to me, however, that the record supports a showing that, at the commencement of business, Respondent could make any such claim. It is true that Respondent hoped and intended to increase the scope, both in quantity and quality, of Bestone's operation, but, as we have seen, that general expectation does not suffice to delay recognition until all of Respondent's hopes are realized. Looked at more microscopically, the record shows that Respondent did not begin business with the sort of predetermined radical changes, destined to occur within a reasonably brief period of time, which would warrant fixing the ''substantial and representative'' date at a time later than February 27.

Respondent did plan to expand its maintenance staff so that a preventative maintenance policy could be instituted, but the timing and need for that expansion was obscure, dependent on the initial installation and repair of machinery and equipment. While there is no contradiction (and could not likely be) of the testimony given by William H. Vest, currently the vice president and general manager of Respondent, that the decision to change from two 10-hour shifts in the whiting will to three 8-hour shifts was made ''before we closed the deal,'' the change was not effected, said Vest, until ''approximately'' late March or early April; this again depended on need, and was also, I think, relatively insignificant and probably inspired in part by a desire to affect the composition of the work force by creating, along with the three shifts, three new ''supervisors'' who would not be counted as members of the former-Bestone-employee majority.[13]

One of the two groups of employees about which discussion is warranted is the ''quarry operations'' group. As noted above, this group of seven employees was discharged from their positions on April 17; the amended complaint alleges that these discharges violated Section 8(a)(3) of the Act. Principally, the General Counsel and Charging Party theorize that the discharges were motivated by a desire to engage in ''intentional manipulation'' of the work force, *Systems Management*, supra.

The record is less than completely explicit as to what sort of work was performed by the Bestone quarry operations employees, but it may be deduced that they had done a certain amount of stripping in the quarry, operated a crushing plant, dried crushed rock, run front end loaders, operated a water truck, hauled rock from the mine and the quarry to the crushing plant, and then hauled the product of those labors to the whiting plant for further disposition. Respondent presented testimony that since it intended eventually to engage in considerably more stripping than Bestone had, and since major stripping requires the use of very large and expensive machines, it was thought to be economical to subcontract the work to its corporate sibling, Rockcrest Contracting. The evidence shows that it was common to have such stripping performed by a subcontractor.

The problem with Respondent's explanation, however, is that the record offers no coherent justification for discharging the seven quarry operations personnel. According to the

[13] The record is quite clear, as Respondent's own witnesses testified, that Respondent's officials were extremely conscious of the ''representative complement'' rule and of the need to keep careful track of the proportion of old and new employees in the unit. Many discussions were held among the management representatives on this subject. Vest testified that they kept a ''running total'' of the two categories, to ''know if we would be in a position to have to bargain.'' This need not be evidence of an intention to manipulate the work force for purposes of successorship, but in the present case, I believe that Respondent entertained such an intent.

The record shows that, under Bestone, three milling operators were employed on each of two 10-hour shifts, supervised only by Jeff Arnold, the superintendent who worked the first shift. Respondent decided that three shifts would be more appropriate. Operators Hearn, Teal, and Kershner were then promoted, on or about March 21, within their probationary 90-day period, to ''supervisory'' status, with each assigned to one of the new three shifts. But, until April 11, when the third of three new operators began work, at least one or more of the three new ''supervisors'' were ''supervising'' only one employee (a former Bestone employee), and thereafter, variously, perhaps two or three at a time. I am most suspicious of the decision to appoint the three new supervisors so hurriedly. As the court of appeals noted in *Systems Management*, supra, 901 F.2d at 305, vigilance must be maintained against the ''intentional manipulation of a work force so as to eliminate the 'successor employer's' obligation to negotiate.''

I find that Hearn, Teal, and Kershner should not have been considered 2(11) supervisors during the material period, although Hearn may later have become one. The evidence as to Teal and Kershner (who did not even testify) in reference to the initial stages of their ''supervisory'' roles is general, theoretical, usually conclusionary, and, at best, demonstrates the sort of leadman-like authority which fails to satisfy Sec. 2(11). *Distillery Workers v. NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961); *NLRB v. Security Guard Service*, 384 F.2d 143, 146–149 (5th Cir. 1967). Accordingly, I would not find that Teal and Kershner were removed from the bargaining unit as of April 19, the date upon which Respondent wrote its letter proclaiming the existence of a ''substantial and representative complement.'' I note that in ''early April of 1990,'' Hearn was promoted again, this time to production superintendent. There is no evidence that his ''day shift supervisor'' slot was even filled, which further suggests the jejune quality of the other two ''supervisory'' positions.

uncontradicted and credited testimony of Ira[14] Avery Jr., he (as a member of the quarry crew) had been a crusher operator under Bestone and continued to do similar work when he went to work for Delta. When he and the other six quarry workers became employed by Rockcrest, about April 18, they performed more or less the same work as they had done for Delta. Moreover, Avery testified that the new equipment brought into the quarry by Rockcrest was usually operated by other Rockcrest employees, not the former Bestone-Delta employees.

At the hearing, Respondent exerted such effort (successfully, I thought) in attempting to establish that it was both reasonable and customary in the industry to subcontract out stripping work. But examination of John Lizak Jr., a Millington employee who served as the acting general manager of Respondent for the first 7 or 8 weeks of its existence, showed that the ''major stripping'' in which Respondent intended to engage was accomplished in a matter of 3 or 4 months, with a seemingly insignificant amount of ongoing stripping thereafter.

The question thus arises: since Rockcrest could perform the bulk of the stripping in a few months with its own expensive equipment, and since the Delta quarry employees who transferred to Rockcrest evidently played no part in the major stripping work but instead, under the banner of Rockcrest, continued to perform essentially the same duties that they had done for Delta, why was it necessary, or sensible, to contract out the *crushing* and *hauling* and related work, ultimately to be done by the former Delta employees now employed by Rockcrest?

Respondent would presumably answer this question by, inter alia, pointing to the March 20 written bid purportedly submitted by Rockcrest,[15] which provides prices for equipment and labor for ''Stripping Overburden,'' ''Load at quarry or Mine,'' ''Haul to Crusher,'' ''Crushing,'' '' Haul to dryer,'' and ''Haul to Whiting Plant,'' and further pointing to an estimate, dated April 13, made by Barton in answer to an earlier request by Conrad Eiben, Respondent's comptroller, for a cost breakdown of what Bestone's expenses would have been in 1988 for the same work. Barton's response, while noting that Bestone's records were not maintained so as to provide accurate figures for the categories requested, attempted, ''based upon standard estimated equipment costs,'' to compile a ''reasonably accurate estimated cost breakdown for the various activities.'' On the same day, after hand-delivery of Barton's letter, Eiben drew up a comparison between ''Bestone Cost'' and ''Rockcrest Quote'' which showed the latter costing less than the former in all six operational categories shown, by an overall per-ton difference in excess of 27 percent.

Eiben testified that they had ''been looking for this letter from Mr. Barton for quite a while'' because Respondent was ''quite anxious to make the comparisons.'' But he later testified that he had already discussed with Barton ''the idea of subcontracting out this part of the work'' and had received from Barton verbally ''some numbers'' which he asked Barton to put in writing so that he would have ''a document to make a comparison.'' After receiving these numbers in written form on April 13 and drawing up the comparison, he conveyed the latter to General Manager Musselman and Vice President Vest.

Vest's testimony on this subject was quite inconsistent. At first, he said that, after acquisition, the question of whether to purchase the stripping equipment or to subcontract the stripping was something that ''they had to decide,'' which is why he asked Rockcrest for a quote. He did not explain why he also had Rockcrest make a bid for the five *other* functions named above. But the testimony given by Respondent's witnesses leaves no doubt that it would have been foolish to buy the expensive equipment needed for just 3–4 months of heavy stripping; that Vest would even *consider* that to be an option is baffling.

Vest further testified that he had ''already made the decision to subcontract before'' he received Barton's letter, and that he just wanted it to ''verify [his] own experience and thoughts.'' This testimony is in direct conflict with Vest's other indications that he ''couldn't make this business decision until Mr. Barton got [his] this information'' and that they were looking at the document he drew up on April 13 as ''a basis for comparison for making a decision.''[16]

That, contrary to this latter line of testimony, the decision was made sometime *before* receipt of Barton's April 13 letter is clearly demonstrated by the following events. In a letter dated April 5, distributed to all Delta employees, then-General Manager Musselman wrote, in part:

> For the past several weeks, we have been reviewing the open pit quarrying and primary and secondary crushing operations to determine whether or not it is better to subcontract these aspects of our operations to an outside subcontractor. Based upon our review of the operations and as part of our initial restructuring, we have decided that it would be more efficient and economic to subcontract these operations. We have received bids for the subcontracting and have awarded a contract to Rockcrest Contracting . . . .

The letter went on to say that the affected employees would be given the opportunity to transfer into certain vacant positions in other departments (as shown on an attached form); that those who did not apply or qualify for a vacancy would be placed on indefinite layoff and given a week's severance pay; and that ''[i]t is possible'' that Rockcrest (which was already performing ''certain removal work'' on site) would hire the terminated personnel to do the Delta Carbonate work, a matter which, the employees were told, should be taken up with Robert Forbes, president of Rockcrest.[17] The attached form showed that Respondent had, by chance, exactly seven vacant positions as of April 5: three plant helper jobs, at $8 per hour; two sorging plant operators, paying $9.50; one over-the-road driver, compensated at ''% of haul + existing time rate''; and a maintenance laborer position earning $10 an hour.

As matters turned out, however, all seven of the quarry workers applied to and were hired by Rockcrest, and appar-

[14] The transcript refers to the employee as Allen, but the records in evidence show that his first name is Ira.

[15] No representative of Rockcrest testified at the hearing.

[16] This testimony, in turn, contradicts Vest's later testimony that owner Mahan made the ''actual decision that Rockcrest would do it'' in ''late March.''

[17] In fact, applications for Rockcrest were placed in the pay envelopes of the seven employees.

ently continued to work for Rockcrest at least until the hearing (there is nothing in the record to suggest the contrary).

Leading the list of suspicious features here is the contrast between Vest's testimony that he had decided upon subcontracting before he received Barton's *April 13* letter, but nonetheless wanted that letter ''to verify [his] own experience and thoughts,'' and then made up a comparison sheet showing that Rockcrest's offer was less expensive than Bestone's estimated experience; and the evidence that on *April 5*, Respondent had already announced to its employees that it had ''awarded a contract to Rockcrest Contracting'' (which, in fact, was currently performing ''certain removal work'' on the site). What businessman, having already entered into such a contract, would go through such a charade? Obviously, the Barton letter and the comparison sheet were brought into being to serve as exhibits in this proceeding.

As for that comparison sheet, while it is somewhat opaque to this layman and there is no record explication of the underlying documents, it is not difficult to spot some very anomalous figures. For example, Barton, using ''standard estimated equipment costs,'' somehow nonetheless arrives at estimates which are consistently higher than Rockcrest's quotations, and Vest neatly displays these disparities (e.g., ''Hauling to dryer/fine plant *Bestone Cost* 1.30 ton *Rockcrest Quote* .52 ton''). What Vest fails to note here is that Barton's $1.30 per ton estimate is based on hauling 125 tons per hour, while Rockcrest's 52 cents is predicated on 280 tons per hour. It is clear from the way in which Barton gives alternative prices, as well as other record sources, that the price per ton decreases as the number of tons increase (for this same work, Barton estimated that at 75 tons per hour, the cost is $2.16 per ton). Vest, however, ignores this factor in making his comparison.

Moreover, assuming the relative accuracy of Barton's ''standard estimated equipment costs,'' the differences between the Barton and Rockcrest figures are inexplicable. For instance, while Barton shows the basic cost of ''Haul to crusher'' for two haulers and their drivers at a total of $150 per hour, Rockcrest's figure is $l15 per hour. That is a staggering difference of $1400 for a 40-hour week, or about $70,000 a year, for the two haulers, and on its face is profoundly suspicious.

In sum, taking this background into account, I entertain grave doubts about the legitimacy of the motivation for discharging the seven quarry operators. At the hearing, Respondent concentrated on the cost of purchasing stripping equipment, but stripping was, evidently, only a minor cost.[18] No good reason appears for firing the seven employees, who were then engaged by Rockcrest to perform essentially the same basic functions they had done for Delta.[19] The likely reason, rather, is that Respondent was attempting to position itself so that it could declare, as it did on April 19, that the former Bestone employees constituted a minority.

Respondent contends that any such conclusion is improper, particularly in view of the fact that it offered the seven employees the (coincidentally) seven jobs with Respondent that were open then. There is force in this argument, but it seems probable that Respondent thought it likely that most or all of the seven employees would not accept the offers. As General Manager Musselman testified, the seven employees had been operating mobile equipment in the quarry and the new jobs with Respondent would be located (with the obvious exception of the over-the-road driver) in the whiting plant. Moreover, the April 5 message made quite clear that the pay rates for the seven Delta vacancies ranged only from $8 (for three of the jobs) to $10, which rates were lower than those that had been received by the employees under the Bestone bargaining agreement (see Tr. 111, G.C. Exh. 7, p. 21, and G.C. Exh. 17) and being offered by Rockcrest (see Tr. 371). While Respondent's brief repeatedly asserts that the employees were told that if they transferred from one job to another, they would receive no lower pay, this argument is based on testimony relating to what *Bestone* employees were told about employment by Delta of former Bestone employees, rather than employment by Rockcrest of former Delta employees.[20]

---

[18] R. Exh. 16, a list of cost savings for the period April 19–July 31 prepared by Vest allegedly in the course of business, shows a saving (by subcontracting to Rockcrest) of $13,682 for stripping as compared, e.g., to $108, 541 for crushing .

[19] There were differences. Ira Avery, who offered the most detailed testimony on this subject, testified that he and two other members of the seven-man group performed short-distance rock hauling when they began work for Rockcrest, whereas previously Avery had been a rock crusher operator with Delta, another employee had driven a water truck, and the third had driven a water truck and performed other jobs. Rockcrest had brought four large trucks on the site, and these were used for rock hauling. There is some second-hand evidence by a consultant named Keating who had heard that the Bestone trucks were in bad shape and beyond resurrection, but the fact is that Delta bought the trucks and Delta used them until April 17. The record does not support a conclusion that the hauling had to be subcontracted in April because of the condition of the Delta trucks.

[20] If he were to be believed, Musselman gave testimony that would itself make General Counsel's case. Musselman testified that Millington official Thomas Brown told him in early April about his concern that Respondent maintain a majority of new employees, and that Brown also expressed his belief that the seven quarry crew members would not be interested in taking the proffered jobs with Respondent, but would rather work for Rockcrest. Musselman also testified, inter alia, that he had heard ''several times from Mr. Vest and from Mr. Brown that they didn't want to deal with the Union and that was the main reason why Rockcrest was there''; present at one of the conversations was Robert Stewart, president of York Building Products Company. Brown denied the substance of Musselman's testimony. Vest and Stewart similarly denied the portion of the testimony involving them.

The credibility resolution is not an easy one. Musselman was discharged by Respondent and, at the time of the hearing, had filed suit claiming nonpayment of a promised bonus. He needed to be refreshed by his affidavit to recall some of his testimony, and I was made uneasy by the vacillation in other testimony by him about the extent to which he played a part in the decision to subcontract. On the surface, however, he seemed a most reliable and honest citizen. I thought that the demeanor of Brown and Vest was somewhat less impressive. Seemingly the most credible witness in the group was York Building's Robert Stewart, who made an excellent impression, but even he worried me: after saying that he did not recall that Vest had told him the reason for subcontracting and that if Vest *had* mentioned the purpose of avoidance of the union, he believed he would have recalled that, he replied less than decisively, when again asked if Vest had made such a statement, ''Not that I know of, no.''

I do not think that a resolution of Musselman's credibility is required in order for General Counsel to prevail on this issue. If, however, I felt obliged to make such a resolution, I would favor Musselman, not only because of his demeanor, not only because of

On the basis of the foregoing discussion, I conclude that General Counsel has made a sufficient showing to support the inference that the Union status of the seven employees was a ''motivating factor'' in the Respondent's decision to terminate them, and I further conclude that Respondent has not shouldered its burden of demonstrating that the same action would have taken place in the absence of the protected status of these workers. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983). The terminations therefore violated Section 8(a)(3) and (1).

The remaining category of employees in the unit worth discussing is the maintenance group. As earlier noted, Respondent's Exhibit 10 shows that Bestone employed only one rank-and-file maintenance employee (and the testimony is that there was a maintenance ''supervisor'' over him); employee Hearn, however, appearing for the Respondent, testified to *three* maintenance employees having worked for Bestone. I am not sure what to make of this. As time passed after the takeover, the maintenance force substantially increased, according to Respondent's Exhibit 10. That document shows that nine more maintenance workers were hired between March 15 and April 28. Through quits and, as well, layoffs, the total number of maintenance employees plummeted to 4 by July 7, and then began gradually rising until, as of April 7, 1990, there were 21 maintenance employees.

Testimony by former acting General Manager Lizak referred to Respondent's ''obsessive'' concern with preventive maintenance, which included a newly adopted computerized program and which reflected an approach quite different from that of Bestone. However, 21 maintenance employees seem rather disproportionate to the equipment changes shown in the record. The real explanation for the magnitude of the increase appears to lie in the testimony of General Manager Vest that Delta now services two sister companies, Rockcrest and Penrock, for maintenance; Penrock's former four maintenance employees now work for Delta as part of the ''centralized maintenance group'' and Penrock rents maintenance employees from Delta; the same is apparently true for Rockcrest. Thus, the figures are evidently inflated by the formation of this ''centralized group,'' but we know little else about it: how it operates, when it was formed, or the degree of commitment of particular employees to particular companies.

I have concluded that, under the precedents, there existed a ''successorship'' which required extension of recognition by Respondent to the Union. In *Fall River Dyeing*, the Supreme Court approved the finding by the court of appeals that a substantial and representative complement was reached when the succeeding employer ''had hired employees in virtually all job classifications, had hired at least 50 percent of those it would ultimately employ in the majority of those classifications, and it employed a *majority* of the employees it would eventually employ when it reached full complement.'' 482 U.S. 27, quoting 775 F.2d 425, 431–432 (emphasis added). In the present case, each element of those tests (though they need not be the only ones) was met as of February 18, and I further find that Respondent was in ''substantially normal production'' as of that day. The fact that Respondent discharged the seven quarry operations employees on April 17 is irrelevant, especially in view of ny conclusion that the discharge of all these employees was effected with an eye toward doctoring the composition of the work force and therefore violated Section 8(a)(3). Similarly, the fact that over a year after the purchase of the quarry, the Respondent finally closed out the underground mine (transferring two of the three miners to the whiting plant) is not relevant to whether the former Bestone employees were entitled to earlier representation; nor does the eventual expansion of the maintenance group affect the right of the employees to prompt recognition of their Union, for the reasons given above.

The record discloses that Respondent invested considerable sums in this project. In addition to the purchase of assets from Barton, Respondent spent more than $1,411,000 on the operation in 1989 and budgeted $2,300,000 for additional capital investment in 1990. But the fact that Respondent expected to grow bigger and better does not, in and of itself, preclude a finding of successorship. ''Significant changes in the scope of the new employer's business are to be considered, but alone they do not negate the possible successorship status of the new business,'' 775 F.2d at 429. In *Fall River*, as earlier indicated, the employee complement had doubled, as the new employer had hoped, 3 months after the date chosen by the Board as the ''substantial and representative complement'' date. ''The critical inquiry is whether any changes in operation have significantly altered the employees' working conditions, the employment relationship, and correspondingly, the employees' expectations and needs with regard to representation.'' Ibid. In my view, no such changes can reasonably be said to have occurred. A quarry is a quarry, a whiting mill is a whiting mill, a truck is a truck. The employees who left Bestone on February 17 and began work for Respondent on February 18 saw no difference in their work functions on the latter date or for many months thereafter; even the employees who went to work for Rockcrest did not leave the site; the major part of the stripping was finished in 3 or 4 months; and life only changed in ways which, I would surmise, could not reasonably have been anticipated by the employer to have affected the employees' desire for representation.[21]

---

his willingness to make admissions in Respondent's favor (such as that relating to his understanding that Respondent intended from the start to expand the facility), but also because the testimony of Musselman is consistent with the other evidence, especially Respondent's conceded and intense interest in the composition of the work force (Eiben testified that he was periodically asked during the spring by Brown, Vest, and Musselman to calculate the relative proportion of old and new employees in the unit, and that Brown called him some five times from Millington to check the ratio while Respondent might argue that it was merely complying with its promise to the Union to track the elusive ''substantial and representative complement,'' that is not what management was focused on; its continuing interest was in the *proportion* of new to old employees. How it came about that Respondent wrote on April 19, 2 days after the termination of the seven employees, that it had reached what it considered a ''substantial and representative'' complement, was never explained.).

[21] Cases replied on by Respondent are not in point in this respect. In *Galis Equipment Co.*, 194 NLRB 799 (1972), the Board found that the succeeding employer's employment of the complement was ''only a temporary expedient to enable it to perform its undertaking to complete [the predecessor's] work in progress,'' after which it intended to use a different hourly work force to produce a different kind of product. In *St. John of God Hospital*, 260 NLRB 905 (1982),

Continued

Finally, I conclude that the subcontracting of the quarry work (with the exception of major stripping) without bargaining with the Union about this decision and its effects, violated Section 8(a)(5) of the Act. As I understand *Collateral Control Corp.*, 288 NLRB 308 (1988), the Board holds that in a situation similar to this one, the General Counsel need not ''sustain a burden of showing that the decision turned on labor costs,'' ibid., but rather that, for 8(a)(5) purposes, *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964), governs. While none of the parties argue the issue, it appears to me that under Fiberboard, the duty to bargain on this subject arose here. The remedy for the seven employees involved does not differ from that arising from the 8(a)(3) finding, but in addition the remedy for the 8(a)(5) violation also encompasses a formal reincorporation of the subcontracted work into the jurisdiction of the bargaining unit. 288 NLRB at 311.

CONCLUSIONS OF LAW

1. Delta Carbonate, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, after February 27, 1989, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described below, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The appropriate bargaining unit consists of:

> All production and maintenance employees and truck drivers at Respondent's York, Pennsylvania, quarry, excluding employees working in and/or engaged as office, clerical, watchmen, executives, salespersons, guards and supervisors.

5. By discharging its quarry operations employees on April 17, 1989, for reasons proscribed by the Act, Respondent violated Section 8(a)(3) and (1) of the Act; and by failing and refusing to bargain about the subcontracting decision which resulted in these discharges, and about its effects, Respondent violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The customary cease-and-desist order should be entered and the traditional notices should be posted.

Having found that Respondent, on April 17, 1989, unlawfully discharged Ben R. Myers, Albert E. Ruppert Jr., Bruce W. Toomey, Walter L. Elicker, Ira Avery Jr., Willard L. Hutson, and Samuel L. Robertson, and failed to bargain about the decision to subcontract and its effects, I shall recommend that it be ordered to offer them immediate and full employment in their former jobs, without prejudice to their seniority and other rights and privileges, and to make them whole for any net loss of earnings and benefits they may have have suffered from the above dates to the dates of Respondent's offers of employment, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[22]

[Recommended Order omitted from publication.]

---

a representation case, the employer had budgeted for specific numbers of classified employees whom it expected to hire within 4–5 months, after an unanticipated decline in employment in these groups prior to the hearing. In *Myers Custom Products*, 278 NLRB 636, 637 (1986), it was held appropriate to delay determining the bargaining obligation only when the ''new employer expects, with reasonable certainty, to increase its employee complement substantially within a relatively short time'' (the Board distinguished, id. at 637 fn. 3, *Pacific Hide & Fur Depot*, 223 NLRB 1029 (1976), where ''the record did not reveal that, when the respondent commenced operations, it knew how many employees it would need or how long it would take to hire the work force.''). A major difference between the present case and *Norton Precision*, 199 NLRB 1003 (1972), is that the old employer manufactured valve lifters by an automated method for a single buyer, while the new one, inter alia, produced hand-assembled lifters for race cars.

[22] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).